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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-260

KENT MEYER, a Resident Taxpayer of Oklahoma City, Oklahoma County, State of Oklahoma, on behalf of himself and all other similarly situated taxpayers,

Petitioner,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, MAYOR JAMES H. NORICK and CITY MANAGER ROBERT H. OLDLAND,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma appears in Appendix A of petitioner's Petition for Writ of Certiorari and is reported in 496 P.2d 789 and therefore is not repeated herein.

JURISDICTION

This Court does not have jurisdiction since the petitioners did not present a Federal question in the trial court, nor in the Oklahoma Supreme Court, nor in their Petition for Writ of Certiorari to the Oklahoma Supreme Court. The judgment of the Oklahoma Supreme Court is on independent, non-federal grounds, sufficiently broad to sustain the decision.

QUESTIONS PRESENTED

1. Is the petition sufficient to invoke the jurisdiction of this Court by relying on 28 U.S.C. 1254(1) since the petition does not seek a writ directed to a Circuit Court of Appeal?

2. May the Supreme Court consider a Federal question which has not been raised at any stage in the proceedings, either in the courts below or in this Court?

3. Was the Petition for Writ of Certiorari timely filed?

4. Does the latin cross on the fairgrounds of The City of Oklahoma City violate any provision of the Constitution of the United States?

STATUTES INVOLVED

As conceded by petitioner in his petition before this Court there is no provision of the United States Constitution or Federal Statutory provision directly involved.

ARGUMENT

I.

THE PETITION IS NOT SUFFICIENT TO INVOKE THE JURISDICTION OF THIS COURT.

Petitioner's jurisdictional statement relies upon 28 U.S.C. 1254(1) to invoke jurisdiction. This statutory provision applies only to cases in the Circuit Courts of Appeals. The present case was finally decided in the Supreme Court of the State of Oklahoma. There is nothing pending in a

Circuit Court of Appeals which would affect this case. Petition cites no cases to sustain jurisdiction under the cited statute.

Rule 15 of this Court provides as follows:

"1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain in the order here indicated—

* * * * * *

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

* * * * * *

(iii) The statutory provision believed to confer on this court jurisdiction of the appeal;

(iv) Cases believed to sustain the jurisdiction."

Rule 23 of this Court provides as follows:

"1. The petition for writ of certiorari shall contain in the order here indicated—

* * * * * *

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing

* * * * * *

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

* * * * * *

"4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

II.

THE SUPREME COURT OF THE UNITED STATES CANNOT CONSIDER A FEDERAL QUESTION WHICH HAS NOT BEEN RAISED AT ANY STAGE IN THE PROCEEDINGS, EITHER IN THE COURTS BELOW OR IN THIS COURT.

This case was litigated and decided entirely on the Oklahoma Constitution without any specific reference to any article or section of the United States Constitution. No Federal question was raised.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway*, 228 U.S. 326, 33 S.Ct. 510, 57 L.Ed. 857, at page 512 of the Supreme Court Reporter, the United States Court holds:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. Cronwell v. Randell, 10 Pet. 368, 398, 9 L.ed 458, 470; Simmerman v. Nebraska, 116 U.S. 54, 29 L.ed 535, Sup.Ct.Rep. 1186; Erie R. Co. v. Purdy, 185 U.S. 148, 153, 46 L.ed 847, 850, 22 Sup.Ct. Rep. 605."

Beck v. *Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98:

> "12. The Supreme Court of the United States cannot entertain a question not raised in the state court below nor actually decided by that court."

16 Am.Jur.2d, *Con. Law*, Section 115, states in part:

"... An appellant who fails to argue a constitutional contention in his brief, ... is considered to have abandoned or waived such contention. ..."

Southwestern Bell Telephone Company v. *State of Oklahoma*, 303 U.S. 206, 58 S.Ct. 528, 82 L.Ed.2d 751:

"2. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

Ward v. *Board of County Commisssioners of Love County, Oklahoma*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751:

"A judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed when such grounds are not plainly untenable."

The Oklahoma Supreme Court decided this case on independent non-federal grounds which are sufficiently broad to sustain the decision.

III.

THE PETITION FOR CERTIORARI WAS NOT TIMELY FILED.

According to Appendix B of the petition herein, a petition for rehearing was denied by the Supreme Court of the State of Oklahoma and the denial was filed therein by the Clerk on May 16, 1972. The 90th day thereafter was Monday, August 14, 1972. The Petition for Writ of Certiorari was sent to the Supreme Court on Tuesday, August 15, 1972.

Meyer seeks this Court's jurisdiction under auspices of 28 U.S.C.A., Section 1254(1), but he did not send his petition to the Supreme Court for filing until 91 days after the decision sought to be reviewed was made final by the highest court of this State in which a decision could be had, i.e., the Supreme Court of the State of Oklahoma.

28 U.S.C.A., Section 2101(c), provides that the writ must be applied for within 90 days, however, for good cause may be extended for an additional 60 days.. No extension of time was asked for by Meyer. If 91 days had expired before the petition was sent, then even more time may have expired before the petition was received and filed in the Supreme Court.

IV.

THE LATIN CROSS ON THE FAIRGROUNDS OF THE CITY OF OKLAHOMA CITY DOES NOT VIOLATE ANY FEDERAL CONSTITUTIONAL PROVISION.

The guidelines for determining whether or not a law establishes a religion or prevents the full exercise of religious beliefs is stated by Mr. Justice Black in *Everson* v. *Board of Education of the Township of Ewing*, 330 U.S. 1-74, 91 L.Ed. 711, as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' Reynolds v. United States, supra, (98 US at 164, 25 L.ed 249)."

As emphasized above, Meyer is not being forced or even coerced to believe in Christianity by the presence of the cross. The cross does not support any religious activity or any religious institution. No money is being used to aid,

support or maintain any religion or any religious institution such as a church school or charity. By placing the lighted cross on the fairgrounds, the City of Oklahoma City is not participating in the affairs of any religious organization or sect.

In the *Everson* case, *supra*, this Court held that governmental funds could be expended to reimburse parents of children attending parochial schools for their transportation to and from such schools, as it did not establish a religion but was for the public welfare.

We submit that the Christmas season and its holidays are just as much if not more secular than Sunday. Sunday, which was originally set aside as a religious day of rest, is now a secular holiday. *McGowan* v. *State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393. Thus it could not be contended that the State or Federal Constitutions are being violated because school teachers are being paid by the taxpayers during the non-working days of the Christmas season or even on Thanksgiving Day. Also see *Zorach* v. *Clauson*, 343 U.S. 306, 72 S.Ct. 476, 96 L.Ed. 954, holding that public schools could "close its doors or suspend its operations as to those who wanted to repair to their religious sanctuary for worship or instruction"; i.e., close for religious holidays. That case also held that the New York City program, which permits students to be released from school to attend religious courses, was constitutional and did not coerce anyone to attend church or to observe a religious holiday or to take religious instructions even though there were students who were compelled to stay in school while others were excused to observe their religions.

There is no allegation that, upon request, the City of Oklahoma City has refused to place on the fairgrounds or on any other public property an insignia that might be classified as a non-Christian symbol. In *Murray* v. *Comptroller of the Treasury Maryland* (Md. 1966), 216 A.2d 897, certiorari recently denied by this Court, the Maryland Court in holding the following tax exemption statute constitutional:

> "'(4) Churches, parsonages, etc.—Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof.'"

said it did not deprive anyone of equal protection, since all houses of worship, including those that did not believe in a Supreme Being were exempt. Here, there is no showing of discrimination.

We also invite attention to *Protestants and Other Americans United for Separation of Church and State* v. *O'Brien* (D.C. 1967), 272 F.Supp. 712, holding the Christmas stamp picturing Memling's "Madonna and Child with Angels" constitutional.

We would also note that in *Fowler* v. *State of Rhode Island* (1953), 345 U.S. 67, this Court held that public property could be used for church services.

Even in the case of *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, wherein the reading of the Bible each day in public school was held unconstitutional, the Court said that the Bible

could be taught in public schools from a secular viewpoint and such was concluded in *Calvary Bible Presbyterian Church of Seattle* v. *Board of Regents of the University of Washington* (1967), 436 P.2d 189.

Clearly the Bible is a religious symbol and, yes, more than a symbol; it contains religious teachings. Now, if the Bible can be taught in the public schools as outlined by the courts, then the fairgrounds cross can be used as an expression of goodwill.

We also submit that it is not unconstitutional for the Federal Government to spend public funds to print on the dollar bill "In God We Trust" or to place on treasury notes and Federal Buildings of the United States the Great Seal. Such seal contains a religious symbol above the pyramid; *i.e.*, the All-Seeing Eye of God. Please see *Rector, Etc., of Holy Trinity Church* (1892), 121 S.Ct. 511.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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